

\*\*E-Filed 7/5/05\*\*

NOT FOR CITATION  
IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

DANIEL SPRINGER,

Plaintiff,

v.

ERNST & YOUNG, LLP, et al.,

Defendants.

Case Number C-05-25-JF

RICHARD GOEBEL,

Plaintiff,

v.

ERNST & YOUNG, LLP, et al.,

Defendants.

Case Number C-05-26-JF

ORDER GRANTING PLAINTIFFS'  
MOTIONS TO REMAND

Before the Court are motions to remand brought by the plaintiffs in two related actions, *Daniel Springer v. Ernst & Young, LLP*, Case No. C-05-25-JF, and *Richard Goebel v. Ernst & Young, LLP*, Case No. C-05-26-JF. The Court has considered the briefing of the parties as well

1 as the oral arguments presented at the hearing on April 29, 2005. For the reasons discussed  
2 below, the motions will be granted.

### 3 I. BACKGROUND

4 The instant actions arise out of Plaintiffs' separation from employment with NextCard,  
5 Inc. ("NextCard"). NextCard was an Internet-based provider of consumer credit that offered an  
6 online credit approval system for a Visa card through its wholly-owned subsidiary, NextBank.  
7 Plaintiffs Daniel Springer ("Springer") and Richard Goebel ("Goebel") were employed by  
8 NextCard at its headquarters in San Francisco.

#### 9 Separation From Employment:

10 Springer alleges that he decided to leave NextCard in June 2000 but that he agreed to stay  
11 until a smooth transition of duties could be achieved. He further alleges that he entered into a  
12 separation agreement effective September 1, 2000, which provided among other things that: (1)  
13 he would be paid \$25,000; (2) his unvested stock options for approximately 150,000 shares  
14 would vest eighteen months after the effective date of the separation agreement; (3) he would not  
15 to sell his existing NextCard shares until one year after the effective date of the separation  
16 agreement or until the stock reached at least \$20 per share; and (4) he would release any  
17 employment-related claims he might have against NextCard and its officers, directors,  
18 employees, attorneys, subsidiaries, affiliated companies and successors in interest.

19 Goebel alleges that in March 2001 he was informed that his position with NextCard was  
20 being eliminated. He was offered a choice between accepting a demotion or terminating his  
21 employment with a separation agreement. He entered into the separation agreement, which  
22 provided among other things that: (1) he would receive three months salary as severance pay and  
23 limited continued medical coverage; (2) he would receive stock options for approximately 35,000  
24 shares, exercisable one year after execution of the separation agreement; and (3) he would release  
25 any employment-related claims he might have against NextCard and its directors, employees and  
26 agents.

#### 27 NextCard's Delaware Bankruptcy Action:

28 On October 31, 2001, NextCard announced that NextBank was substantially increasing

1 loan loss allowances, tightening underwriting criteria by limiting new account originations to  
2 FICO scores above 680, suspending other lending activities, reclassifying previously recognized  
3 fraud losses as credit losses and increasing risk weighted assets by more than \$500 million.  
4 NextCard's stock declined 84% to less than a dollar a share on this news. On February 7, 2002,  
5 the Office of the Comptroller of the Currency ("OCC") closed NextBank and appointed the FDIC  
6 as receiver. NextCard filed a Chapter 11 bankruptcy action in the United States Bankruptcy  
7 Court for the District of Delaware ("Delaware Bankruptcy Court") on November 14, 2002. The  
8 case was converted to a Chapter 7 case and remains pending in the Delaware Bankruptcy Court.

9 Proofs Of Claim In Delaware Bankruptcy Action:

10 Springer and Goebel filed proofs of claim in the NextCard bankruptcy action on March  
11 26, 2003 and March 27, 2003, respectively, alleging claims for fraud, breach of fiduciary duty  
12 and breach of contract against individual NextCard officers and directors. Each also served a  
13 notice upon NextCard purporting to rescind their separation agreements; unless rescinded, those  
14 agreements bar the assertion of claims against NextCard's officers and directors.

15 San Francisco Action:

16 On October 30, 2003, Springer and Goebels filed separate complaints in the San  
17 Francisco Superior Court, asserting fraud and related claims against individual NextCard officers  
18 and directors and seeking rescission of their separation agreements. NextCard was not named as  
19 a defendant in these actions because of the bankruptcy stay. The defendant officers and directors  
20 removed the actions to the United States Bankruptcy Court for the Northern District of  
21 California, San Francisco Division ("San Francisco Bankruptcy Court"), asserting that the  
22 actions involved core bankruptcy proceedings or at least were "related to" the Delaware  
23 bankruptcy. The defendant officers and directors then moved to dismiss the actions, asserting  
24 that NextCard was an indispensable party because it was a party to the separation agreements, but  
25 that NextCard could not be joined in light of the automatic bankruptcy stay. The defendant  
26 officers and directors also asserted that Plaintiffs had failed to plead fraud with sufficient  
27 particularity. Springer and Goebels both moved for remand to the San Francisco Superior Court.  
28 They did not challenge the San Francisco Bankruptcy Court's jurisdiction, but requested remand

1 on equitable grounds pursuant to 28 U.S.C. § 1452.

2 The San Francisco Bankruptcy Court dismissed the actions against NextCard's officers  
3 and directors for failure to join NextCard as an indispensable party, but left open the question of  
4 whether leave to amend to add NextCard would be granted if Springer and Goebels could obtain  
5 relief from the bankruptcy stay. The court denied the motion to dismiss for failure to plead fraud  
6 with sufficient particularity. Finally, the court denied the motion for remand without prejudice.  
7 Springer and Goebels then unsuccessfully sought relief from stay in the Delaware Bankruptcy  
8 Court.

9 Complaints In Delaware Bankruptcy Court:

10 On November 1, 2004, Springer and Goebels filed separate complaints in the Delaware  
11 Bankruptcy Court against the same officers and directors they had sued in the San Francisco  
12 Action. Plaintiffs also named NextCard as a defendant with respect to claims for rescission of  
13 their separation agreements.<sup>1</sup> Those actions remain pending.

14 Instant Actions Against Ernst & Young And Its Employees:

15 Springer and Goebels then filed separate complaints in the San Francisco Superior Court  
16 against NextCard's outside auditor, Ernst & Young, LLP, and three of its individual employees  
17 (collectively "E&Y"), asserting fraud and related claims based upon E&Y's alleged accounting  
18 improprieties. E&Y removed the complaints to this Court on January 3, 2005 pursuant to 28  
19 U.S.C. § 1452(a), based upon its assertion that the actions are "related to" NextCard's  
20 bankruptcy. Springer and Goebels seek remand to the San Francisco Superior Court.

21 **II. DISCUSSION**

22 **(A) Appropriate Court To Decide Plaintiffs' Remand Motions**

23 Plaintiffs assert that their state court actions properly should have been removed to the  
24 bankruptcy court rather than the district court and request that this Court refer their remand  
25 motions to the San Francisco Bankruptcy Court for disposition. This Court's Bankruptcy Local  
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27 <sup>1</sup> The automatic stay does not preclude the filing of a complaint against a debtor in the  
28 court where the debtor filed bankruptcy.

Rules contain a general reference to the bankruptcy court for all civil proceedings arising under Title 11 or arising in or related to a case under Title 11. Bank. L. R. 5011-1(a). Because E&Y removed the actions on the basis of “related to” jurisdiction, it appears that the matter should have been referred to the bankruptcy court at the time of removal. However, that did not occur, and this Court has expended significant time and effort in familiarizing itself with the complicated procedural background of the cases, reviewing the parties’ contentions and the applicable law, and conducting a hearing. Under these circumstances, considerations of timeliness and judicial economy lead the Court to conclude that it should decide the pending remand motions rather than transferring the actions to the bankruptcy court. Even if the Court had referred the actions to the bankruptcy court, such referral could have been withdrawn at the Court’s discretion. 28 U.S.C. § 157(d); Bank. L. R. 5011-2. At the hearing, Plaintiffs’ counsel conceded that this Court has jurisdiction to decide the remand motions. The Court therefore will proceed to consideration of the remand motions.<sup>2</sup>

## **(B) Motions For Remand**

Plaintiffs argue that the actions must be remanded because this Court lacks subject matter jurisdiction. Alternatively, Plaintiffs argue that if subject matter jurisdiction exists, the actions should be remanded on equitable grounds.

### **1. Subject Matter Jurisdiction**

E&Y removed the instant actions pursuant to 28 U.S.C. § 1452(a), permitting removal of claims over which the district court has jurisdiction under 28 U.S.C. § 1334. Section 1334(b) confers upon district courts original but not exclusive jurisdiction over “all civil proceedings arising under title 11, or arising in or related to cases under title 11.” 28 U.S.C. § 1334(b). Proceedings “arising under” Title 11 are those proceedings involving a cause of action created or determined by a statutory provision of Title 11. *In re Harris Pine Mills*, 44 F.3d 1431, 1435 (9th

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<sup>2</sup> The Court notes that Plaintiffs have demanded a jury trial and do not consent to a jury trial in the bankruptcy court. Consequently, even if this Court were to transfer the actions to the bankruptcy court for disposition of the remand motions and those motions were denied, the actions would be transferred back to this court to be litigated.

1 Cir. 1995). Proceedings “arising in” Title 11 cases are those administrative matters arising only  
2 in bankruptcy cases. *Id.* Proceedings “related to” Title 11 cases are those proceedings that  
3 conceivably could have any effect on an estate being administered in bankruptcy. *In re Fietz*,  
4 852 F.2d 455, 457 (9th Cir. 1988).

5 In its papers, E&Y asserts that Plaintiffs’ actions against it are “related to” the NextCard  
6 bankruptcy for the following reasons: (1) E&Y will assert an equitable contribution claim  
7 against NextCard in the event E&Y is found liable to Plaintiffs; (2) a state court action might  
8 impose discovery burdens on the debtor, NextCard; and (3) judgment for Plaintiffs in these  
9 actions might have a collateral estoppel effect against the debtor, NextCard. At the hearing,  
10 E&Y abandoned the latter two reasons and made clear that it is asserting “related to” jurisdiction  
11 based upon E&Y’s potential equitable contribution claim against NextCard. In any event, the  
12 Court concludes that these reasons would not suffice to establish “related to” jurisdiction. The  
13 Court has not discovered any authority for the proposition that a state court action becomes  
14 “related to” a bankruptcy simply because some discovery might be required of the debtor.  
15 Moreover, judgment for Plaintiffs in the instant actions against E&Y could not have a collateral  
16 estoppel effect upon NextCard because NextCard is not a party to the instant actions. Subject  
17 matter jurisdiction thus depends solely upon E&Y’s contention that it will assert an equitable  
18 contribution claim against NextCard in the event E&Y is found liable to Plaintiffs in the instant  
19 actions.

20 Whether E&Y’s potential future equitable contribution claim against NextCard creates a  
21 sufficient nexus between the instant actions and the NextCard bankruptcy to create “related to”  
22 jurisdiction presents a difficult question. In *Fietz v. Great Western Savings*, 852 F.2d 455 (9th  
23 Cir. 1988), the Ninth Circuit adopted the test set forth by the Third Circuit in *Pacor, Inc. v.*  
24 *Higgins*, 743 F.2d 984 (3d Cir. 1984), *overruled on other grounds by Things Remembered, Inc.*  
25 *v. Petrarca*, 516 U.S. 124 (1995). In *Pacor*, John and Louise Higgins brought a state court action  
26 against Pacor for damages arising from John Higgins’ exposure to asbestos supplied by Pacor.  
27 Pacor filed a third party complaint against Manville, the original manufacturer of the asbestos.  
28 Manville subsequently filed for bankruptcy and Pacor’s third party action against Manville was

1 severed from the main action. A dispute thereafter arose as to whether the Higgins-Pacor action  
 2 was “related to” the Manville bankruptcy such that the entire controversy could be removed to  
 3 bankruptcy court. The Third Circuit concluded that “related to” jurisdiction did not exist.

4 The Third Circuit noted that in enacting 28 U.S.C. § 1471(b), the statutory predecessor to  
 5 § 1334(b), “Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so  
 6 that they might deal efficiently and expeditiously with all matters connected with the bankruptcy  
 7 estate.” *Pacor*, 743 F.2d at 994. However, the court noted that the reach of the statute was not  
 8 unlimited, and that for subject matter jurisdiction to exist there must be a practical nexus between  
 9 the civil action and the bankruptcy. *Id.* The court stated the test for determining whether such a  
 10 nexus exists as follows:

11 The usual articulation of the test for determining whether a civil proceeding is  
 12 related to bankruptcy is whether *the outcome of the proceeding could conceivably*  
 13 *have any effect on the estate being administered in bankruptcy.* [citations  
 14 omitted]. Thus, the proceeding need not necessarily be against the debtor or  
 15 against the debtor’s property. An action is related to bankruptcy if the outcome  
 16 could alter the debtor’s rights, liabilities, options, or freedom of action (either  
 17 positively or negatively) and which in any way impacts upon the handling and  
 18 administration of the bankrupt estate.

16 *Id.*

17 Applying this test to the facts of the case before it, the Third Circuit concluded that “at  
 18 best” the Higgins’ action against Pacor was “a mere precursor to the potential third party claim  
 19 for indemnification by Pacor against Manville.” *Id.* at 995. The court stated that the outcome of  
 20 the Higgins-Pacor action could not determine any rights, liabilities or course of action of the  
 21 bankruptcy debtor, Manville. *Id.* The court further stated that because Manville was not a party  
 22 to the Higgins-Pacor action, it could not be bound by *res judicata* or collateral estoppel. *Id.* The  
 23 court found that the bankruptcy estate therefore “could not be affected in any way until the Pacor-  
 24 Manville third party action is actually brought and tried.” *Id.* The court distinguished the case  
 25 before it from those cases in which a written indemnity agreement made liability of the debtor on  
 26 a subsequent claim for indemnity or contribution virtually certain, or “automatic.” *Id.*

27 In *Fietz*, the Ninth Circuit explicitly adopted the *Pacor* test, characterizing it as the  
 28 broadest articulation of “related to” jurisdiction among the circuits. *Fietz*, 852 F.2d at 457. The

1 Ninth Circuit rejected formulations adopted by other circuits under which jurisdiction would not  
2 exist “where the civil action is ‘conceivably’ related to the bankruptcy estate, but that  
3 relationship is remote.” *Id.* In embracing the formulation articulated by *Pacor*, the court stated  
4 that “[w]e reject any limitation on this definition; to the extent that other circuits may limit  
5 jurisdiction where the *Pacor* decision would not, we stand by *Pacor*.” *Id.*

6 The Bankruptcy Appellate Panel (“BAP”) has applied the *Pacor* test to find a lack of  
7 “related to” jurisdiction on facts similar to those in the instant actions. In *In re ACI-HDT Supply*  
8 *Co.*, 205 B.R. 231 (9th Cir. BAP 1997), the plaintiff investors alleged that they were defrauded  
9 of more than \$60 million in a “Ponzi” scheme marketed by a corporation, its officers and other  
10 corporate partners. After the corporation filed for bankruptcy, the plaintiffs sued a number of the  
11 officers and corporate partners in state court. One of the defendants removed the action to the  
12 bankruptcy court, asserting that it was a core bankruptcy proceeding or that it was at least  
13 “related to” the bankruptcy. Although the theory underlying the assertion of “related to”  
14 jurisdiction was not clearly articulated in the decision, the theory apparently was that the state  
15 court defendants and debtor corporation were joint tortfeasors in the Ponzi scheme. The BAP  
16 concluded that there was no “related to” jurisdiction because there was no evidence that the state  
17 court action would have any effect upon the bankruptcy estate, the debtor was not named as a  
18 party in the state court action, and the state court action did not usurp any claims that the  
19 bankruptcy trustee would have. *Id.* at 237-38. The same is true with respect to the actions  
20 currently before this Court. While E&Y and NextCard are alleged to be joint tortfeasors with  
21 respect to the alleged fraud against Plaintiffs, the instant actions cannot have any direct effect on  
22 the bankruptcy. In the words of the *Pacor* court, the instant actions are at most “precursors” to  
23 eventual third-party claims that E&Y might assert against NextCard in the event E&Y is found  
24 liable here.

25 If these were the only authorities on point, this Court would have little difficulty in  
26 concluding that “related to” jurisdiction does not exist. However, E&Y points out that the Third  
27 Circuit appears to have drawn back from certain limitations on “related to” jurisdiction  
28 articulated in *Pacor*. In *In re Marcus Hook Dev. Park, Inc.*, 943 F.2d 261 (3rd Cir. 1991), the

1 court held that “[a] key word in [the *Pacor* test] is ‘conceivable.’ Certainty, or even likelihood,  
2 is not a requirement.” *Id.* at 264-65. This language undercuts the language in *Pacor* indicating  
3 that there must be some certainty that a successful contribution or indemnification claim would  
4 be brought against the debtor.

5 E&Y also relies heavily upon a Sixth Circuit case, *In re Dow Corning Corp.*, 86 F.3d 482  
6 (6th Cir. 1996), in which the court expressly rejected an “automatic” liability requirement. Until  
7 the early nineties, Dow Corning was the predominant producer of silicone gel breast implants  
8 and also supplied raw materials to other manufacturers. Amidst lawsuits by thousands of implant  
9 recipients against Dow Corning and others, Dow Corning filed for bankruptcy. A question arose  
10 whether suits against the nondebtor suppliers and manufacturers were “related to” the Dow  
11 Corning bankruptcy. The Sixth Circuit found that because the suits against the nondebtors  
12 *potentially* could give rise to claims for contribution or indemnification against Dow Corning, the  
13 suits against the nondebtors were “related to” the bankruptcy. *Id.* at 494. The court  
14 distinguished the facts before it from those in the *Pacor* action, stating that “[w]e believe there is  
15 a qualitative difference between the single suit involved in *Pacor* and the overwhelming number  
16 of cases asserted against Dow Corning and the nondebtor defendants in this case. A single  
17 possible claim for indemnification or contribution simply does not represent the same kind of  
18 threat to a debtor’s reorganization plan as that posed by the thousands of potential  
19 indemnification claims at issue here.” *Id.* However, this distinction is presented as an *additional*  
20 reason for declining to apply the “automatic” liability rationale set forth in *Pacor*; *Dow Corning*  
21 appears to squarely reject *any* requirement of certainty that the bankruptcy estate will be affected,  
22 and to hold that the *possibility* of a future contribution or indemnification claim against the  
23 debtor is sufficient to confer “related to” jurisdiction over a civil action between nondebtors.

24 Finally, E&Y cites a number of district court decisions holding that an action between  
25 nondebtors is “related to” a bankruptcy if there is a potential that the action might at some point  
26 result in contribution or indemnification claims against the bankruptcy debtor. *See, e.g., Pacific*  
27 *Life Ins. Co. v. J.P. Morgan Chase & Co.*, 2003 WL 22025158, at \*1 (C.D. Cal. 2003) (finding  
28 “related to” jurisdiction on the basis of written indemnification agreements between defendants

1 and debtor, but stating broadly that “[c]ontingent claims of contribution and indemnification such  
2 as those raised by Defendants may be sufficient to invoke ‘related to’ jurisdiction, *even if*  
3 *Defendants are not guaranteed indemnification*”) (emphasis added); *In re Sizzler Restaurants*  
4 *Int’l, Inc.*, 262 B.R. 811, 819 n.5 (C.D. Cal. 2001) (holding that “[t]his court declines to accept a  
5 reading of *Pacor* which requires an unconditional indemnification agreement or otherwise  
6 automatic liability on the part of the debtor in order to find the existence of related to  
7 jurisdiction”).

8 The Court is left with the impression that the standard originally articulated in *Pacor* has  
9 evolved in a manner suggesting that the Third Circuit, if it were confronted with the facts of  
10 *Pacor* today, might conclude that “related to” jurisdiction existed after all. This impression is  
11 troubling in light of the Ninth Circuit’s characterization of *Pacor* as the most expansive  
12 articulation of “related to” jurisdiction and refusal to adopt more limited approaches of other  
13 circuits, including the Sixth Circuit, which now has rejected *Pacor*’s “automatic” liability  
14 language as inappropriately narrow.

15 This Court thus is left with something of a dilemma. The Ninth Circuit clearly and  
16 unambiguously adopted *Pacor* in *Fietz*. Applying *Pacor* to the facts before this Court, it would  
17 be impossible to find the existence of “related to” jurisdiction. However, E&Y makes an  
18 appealing argument that strict application of *Pacor* would be contrary to current trends and that if  
19 confronted with the issue today the Ninth Circuit would adopt the broader test for “related to”  
20 jurisdiction articulated in the recent cases discussed above. While E&Y may be correct as to  
21 what the Ninth Circuit would do if confronted with the issue today, this Court is bound by what  
22 the Ninth Circuit did when confronted with the issue in 1988, which was to adopt *Pacor*  
23 explicitly and without reservation. Applying that case here, the Court is constrained to grant  
24 Plaintiffs’ motions to remand.

## 25 2. Equitable Considerations For Remand

26 Because the Court concludes that it lacks “related to” jurisdiction, it need not address  
27 Plaintiffs’ alternative request that the Court exercise its discretion to remand the actions under 28  
28 U.S.C. 1452. Were the Court to conclude that it has subject matter jurisdiction, it likely would

1 not remand the actions on equitable grounds. In light of the Court's familiarity with the  
2 NextCard securities fraud action and a number of related actions,<sup>3</sup> judicial efficiency and  
3 economy would have argued strongly for keeping the case here. However, such considerations  
4 cannot confer subject matter jurisdiction where none otherwise exists.

5 **III. ORDER**

6 Plaintiffs' motions for remand are GRANTED.

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10  
11 DATED: July 5, 2005

12 /s/ electronic signature authorized

13 \_\_\_\_\_  
14 JEREMY FOGEL  
15 United States District Judge  
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27 \_\_\_\_\_  
28 <sup>3</sup> The earlier assignment of the securities fraud action and related cases to this Court was  
the basis of the transfer of the instant cases to this Court as additional related cases.

1 This Order was served on the following persons:

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